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8	IN THE UNITED STATES DISTRICT COURT	
9	NORTHERN DISTRICT OF CALIFORNIA	
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11	SECOND IMAGE, INC., a California corporation	Case No. C 07 5242 PJH
12	Plaintiff,	DEFENDANT CHRISTINA SANCHEZ'S REPLY TO PLAINTIFF'S OPPOSITION
13	T MINUTE,	TO SANCHEZ'S AMENDED MOTION TO DISMISS FIRST AMENDED
14	VS.	COMPLAINT
15	RONSIN PHOTOCOPY, INC., a California Corporation; CHRISTINA SANCHEZ, an	Date: February 27, 2008 Time: 9:00 AM
16	individual; and DOES 1-10	Dept.: 3 Hon. Phyllis J. Hamilton
17	Defendants.	
18	AND RELATED CROSS-CLAIM.	
19		
20	I. THE FIRST AMENDED COMPLAINT DOES NOT ALLEGE SPECIFIC FACTS WHICH, IF PROVEN, WOULD MAKE DEFENDANT SANCHEZ LIABLE AS A CO-CONSPIRATOR FOR VIOLATION OF ANY FEDERAL	
21		
22	LAW	
23	Paragraph 27 of the First Amended Complaint ("FAC") alleges that undifferentiated	
24	"Defendants," not defendant Sanchez, have knowingly and with intent to defraud, accessed	
25	plaintiff's protected computer without authorization, and by means of such conduct have	
26	furthered their intended fraud and obtained proprietary business information of plaintiff.	
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Similarly, the general allegations in paragraphs 20 through 23 of the FAC do not allege that defendant Sanchez did any particular act that violated any federal statute. Instead, those paragraphs allege, for example, that "Defendants" entered into an agreement to commit the alleged wrongs (paragraph 20); "Defendants" portrayed Sanchez as a bona fide consumer of plaintiff's services and hacked into other clients' accounts (paragraph 21); "Defendants" have made false representations about the security of records hosted on plaintiff's website (paragraph 22); and "Defendants" gained unlawful access to plaintiff's non-public and proprietary information (paragraph 23).

In a civil conspiracy action, which is essentially what this action is in regard to defendant Sanchez, "courts insist upon a higher level of specificity than is usually demanded of other pleadings..." *Wasco Products v. Southwall Technologies*, 435 F.3d 989, 991 (9th Cir. 2006), quoting from *Alfus v. Pyramid Tech. Corp.*, 745 F.Supp. 1511, 1521 (N.D.Cal.1990). See also FRCP 9(b), which provides that allegations of fraud "shall be stated with particularity."

Plaintiff has no difficulty pleading specific allegations of alleged wrongful conduct on the part of defendant Ronsin Photocopy; see paragraph 19 of the FAC. There are no such specific allegations against defendant Sanchez. The vague and general "conspiracy" allegations in the FAC should not be held sufficient to subject Christina Sanchez to federal subject matter jurisdiction.

II. DEFENDANT SANCHEZ DOES NOT HAVE THE LEGAL CAPACITY TO COMMIT THE WRONGS ALLEGED IN THE FAC AND SHE THEREFORE CANNOT BE LIABLE FOR THOSE ACTIONS UNDER A CIVIL CONSPIRACY THEORY

Paragraph 20 of the FAC alleges that "Defendants" entered into an agreement to unlawfully gain access to plaintiff's private website, so as to gain access to Second Images's trade secrets, pilfer plaintiff's clients and obtain an unfair business advantage over plaintiff. Paragraph 27 alleges that "Defendants" knowingly and with intent to defraud accessed plaintiff's protected computer without authorization and have obtained proprietary business information of plaintiff.

"By its nature, tort liability arising from conspiracy presupposes that the

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coconspirator is legally capable of committing the tort, i.e., that he or she owes a duty to plaintiff recognized by law and is potentially subject to liability for breach of that duty." *Applied Equipment Corp. v. Litton Saudi Arabia Ltd.* (1994) 7 Cal.4th 503, 511. The FAC alleges at paragraph 18 that defendant Sanchez was a paralegal at the Neal, Haushalter law firm. The FAC does not allege that defendant Sanchez had the legal capacity to pilfer (i.e., steal) plaintiff's clients, to obtain an unfair business advantage over plaintiff, or to obtain proprietary business information. It does not allege that defendant Sanchez was a business competitor of plaintiff, or that Sanchez gained anything as a result of the alleged torts. Therefore defendant Sanchez cannot be liable for civil conspiracy for some other person allegedly committing those torts.

III. DEFENDANT SANCHEZ HAS NOT WAIVED HER OBJECTION TO SUBJECT MATTER JURISDICTION BY FILING A CROSS-CLAIM

Defendant Sanchez's cross-claim, filed with her answer to the original complaint, does not waive her objection that the court does not have subject-matter jurisdiction. Lack of subject matter jurisdiction is not waived by failure to object, and it can be raised at any stage of the proceeding. FRCP 12(h)(3); see Schwarzer, Tashima and Wagstaffe, California Practice Guide, Civil Procedure Before Trial, sections 2:14-15 (The Rutter Group, 2003).

CONCLUSION

On the basis of the facts and authorities cited herein, and in defendant's moving papers, defendant Christina Sanchez prays that her motion to dismiss the first amended complaint be granted, and that the first amended complaint be dismissed as to her.

DATED: February 12, 2008 CESARI, WERNER AND MORIARTY

BY: /S/
STEPHEN L. DAHM
Attorneys for Defendant
CHRISTINA SANCHEZ

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